

PD-1047-18

IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
4/16/2019
DEANA WILLIAMSON, CLERK

JOSE MUSA-VALLE,
Appellant

v.

THE STATE OF TEXAS,
Appellee

**ON APPEAL FROM THE COUNTY COURT AT LAW NO. 5
OF BEXAR COUNTY, TEXAS
CAUSE NUMBER 538466**

REPLY BRIEF FOR THE STATE

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REPLY BRIEF FOR THE STATE

To the Honorable Court of Criminal Appeals:

Now comes, Joe D. Gonzales, Criminal District Attorney of Bexar County, Texas, and files this reply brief for the State.

STATEMENT OF THE CASE

On February 24, 2017, an information, complaint, and probable cause affidavit were filed in the County Clerk's office of Bexar County, charging Jose Leon Musa-Valle with the misdemeanor offense of discharging a firearm. (C.R. at 5-7). Specifically, the charging documents stated that on January 22, 2017, Jose-Musa-Valle recklessly discharged a firearm inside the corporate limits of a municipality having a population of 100,000 or more; namely, San Antonio by shooting a gun in an area where others reside and were present. (C.R. at 5).

On March 31, 2017, counsel for Musa-Valle filed a motion to set aside the information. (C.R. at 10-12). On April 7, 2017, a hearing on the motion was held, and after hearing argument from both sides, the trial court granted the defense's motion to set aside the information. (C.R. at 19). On April 27, 2017, the State filed a notice of appeal. (C.R. at 20). The Fourth Court of Appeals overturned the trial court on July 5, 2018, leading to Appellant's petition to this Court.

STATEMENT OF FACTS

On January 22, 2017, Officer Hardeman heard gun shots coming from a

residence. (C.R. at 7). Following the direction of where he heard the gun shots emanating from, Officer Hardeman found Jose Musa-Valle in the back yard of the residence holding a handgun. (C.R. at 7). The San Antonio Police Department filed an offense report with the Bexar County District Attorney's Office. *Id.* Based on that report the State filed charges against Musa-Valle, accusing him of committing the offense of discharging a firearm under Penal Code § 42.12. (C.R. at 5-7).

At the hearing on the motion to set aside the information, the court heard arguments from defense counsel and the prosecutor. The defense argued the State filed charges in the wrong venue because Musa-Valle should have been charged under a San Antonio Municipal Ordinance. (R.R. at 4 and 6). Musa-Valle asserted that the doctrine of *in pari materia* applied to his case and that the law demanded the State only file charges under the city ordinance because the ordinance has a lower punishment range as a class 'c' misdemeanor. The State countered that the doctrine of *in pari materia* was not applicable because the doctrine works to analyze the legislative intent of the same legislative bodies. The State explained that the doctrine does not apply to two completely separate legislative bodies—in this case the State Legislature and the City of San Antonio. (R.R. at 7). The defense argued in the alternative that since the Texas State Legislature gave the

City specific power to create its own firearm ordinance under Penal Code § 42.12(d), the prosecutor can only charge the criminal activity under the municipal ordinance. (R.R. at 7-9). The State pointed out the fallacy of interpreting of subsection (d) in this manner because doing so would mean the legislature created a criminal offense and then took away its power to prosecute under the same law. (R.R. at 14). In the end the trial court granted the defense’s motion quashing the State’s charging document and the State appealed. The trial court signed the only order in the record, which granted “Defendant’s Motion to Set Aside the Information” (C.R. at 19).¹

SUMMARY OF THE ARGUMENT

The State respectfully requests that this Court to dismiss Appellant’s Petition as improvidently granted. Appellant successfully confused the issue at the trial level and attempts to overcomplicate the issue with this Court. He takes what should be a simple exercise of prosecutorial discretion and attempts to make it a feat of statutory construction. But as the State will show below, there is no statutory construction analysis that must be done by this Court. The preemption doctrine does not produce the result Musa-Valle wants because it does not allow for a city ordinance to negate the Texas Penal Code. In addition, the *in pari materia* doctrine is not applicable here because it does not apply to a comparison

¹ Appellant attempts to create ambiguity about what the parties and the trial court were considering by pointing to the “supplemental motion” he filed. The signed order does not state “supplemental motion,” but clearly states the “Motion to Set Aside” was granted. In addition, the trial record clearly shows the parties and the trial court were discussing the doctrines of preemption and *in pari materia*.

of laws from two different governing bodies. Based on these reasons, the State respectfully requests the court deny appellant's position as improvidently granted because appellant does not provide this Court with an issue that needs to be decided.

ARGUMENT

Standard of Review

Since this issue involves one of statutory analysis, it is a question of law and requires a de novo review. *Ramos v. State*, 303 S.W.3d 302, 306 (Tex. Crim. App. 2009). A court of review performs statutory interpretation by focusing on the literal text of the statute and works to decide the fair meaning of the text that also gives full effect to the intent and the purpose of the legislation. *See State v. Cooper*, 420 S.W.3d 829, 831 (Tex. Crim. App. 2013). There is also a presumption that the Legislature intended for the entire statutory scheme to be effective. *See Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014) (citation omitted).

Law and Application

1. Prosecutorial Discretion, Not Preemption

Appellant argues that the Fourth Court failed to address his issue regarding the City of San Antonio's power to enact an ordinance criminalizing discharging of a firearm within the city's limits. The Fourth Court, however, did address it and agreed with Musa-Valle that San Antonio does have the power to make such an

ordinance under Penal Code Section 42.12(d). *See State v. Musa-Valle*, No. 04-17-00278-CR, 2018 Tex. App. LEXIS 5017, at *15 n.3 (Tex. App.—San Antonio July 5, 2018) (unpublished opinion) (noting the authority given to cities to pass their own discharge of firearm ordinances under 42.12(d)). In addition, the State agrees with Appellant’s basic premise that San Antonio is a home rule city that has the power to promulgate an ordinance that criminalizes discharging firearms within the city limits. The State does not agree, however, that simply because the City has this power means the District Attorney is prohibited from filing charges under Penal Code § 42.12. Musa-Valle misunderstands the State’s position when he argues the State’s position was that Ordinance § 21-152 was not enforceable. That is not the State’s position; in fact, the State does not quarrel with most of the appellant’s first issue. But what the State does not agree with, and what Musa-Valle fails to explain to this Court, is how the fact that the City has the power to create a law means that the prosecutor has no power to file charges under an appropriate Penal Code statute. Put simply, Appellant seeks a result that his legal premise does not provide.

The city ordinance is not preempted because Penal Code § 42.12(d) states that the authority of a city to enact an ordinance is not affected. Tex. Penal Code Ann. § 42.12(d) (West). But this grant of power to cities does not narrow or

reduce the power of the statute. The Penal Code statute cannot be preempted by a city ordinance because that is not how the preemption doctrine works or what the Texas Constitution provides. Under the preemption doctrine, if there is a conflict, then the State law controls. *See City of Laredo v. Laredo Merchs. Ass’n*, 550 S.W.3d 586, 592-93 (Tex. 2018) (stating, “the question is not whether the Legislature can preempt a local regulation . . . but whether it has. (emphasis in original)). Moreover, the Texas Constitution states, “[t]he adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.” *See* Tex. Const. art. XI, § 5. Simply put, a city ordinance cannot negate or preempt a state law.

Moreover, it would be illogical that the Texas State Legislature would create a law and then within that same law invalidate the enforcement power of that law. Under Musa-Valle’s interpretation of the preemption law as applied to the discharge of a firearm statute, the only time Section 42.12 would apply would be in cities that were over 100,000 that do not have a law governing discharge of a firearm. The statute is already narrowly applies to cities over 100,000, and Musa-Valle’s interpretation would narrow its application even more to apply to only a

smaller subsection of cities over 100,000 that do not have their own discharge laws. This would be an absurd result and statutory construction should not produce absurd results. *Hebner v. Reddy*, 98 S.W.d 37, 41 (Tex. 2016) (citing a basic tenement of statutory construction that courts follow and interpret the legislative intent based on the plain meaning of a statute's words unless it would produce an absurd result). Tex. Penal Code Ann. § 42.12(d) states municipalities may also create laws regulating discharging a firearm, but the statute does not say that city ordinances would prevent the enforcement of the state statute.

Since both laws remain valid and enforceable, the only question is which one the prosecutor charges. The answer is simple—it is whichever one the prosecutor decides fits the facts and circumstances of the alleged crime. *Alejos v. State*, 555 S.W.2d 444 (Tex. Crim. App. 1977) (opinion on rehearing) (finding that while under the facts the appellant could have been prosecuted under either law, the State properly exercised its discretion in pursuing the Penal Code evading arrest violation). There are Texas statutes that overlap and often there are times when a person's actions may violate multiple statutes. In those cases, it is well settled that the State has the discretion to charge the offense that best fits the circumstances and best seeks justice. *See Avery v. State*, 359 S.W.3d 230, 236 (Tex. Crim. App. 2012). In the instant case, the State had the discretion to file

under the San Antonio municipal code section or under the Penal Code. The State chose to file under Tex. Penal Code Ann. § 42.12 and they acted within their legal discretion.²

In the end, 42.12(d) and San Antonio Ordinance § 21-152 do not strip the District Attorney's office of power to prosecute a crime under Tex. Penal Code Ann. § 42.12. Since the remedy Musa-Valle seeks does not apply under the preemption doctrine or come from the plain reading of the statute, his first issue should be dismissed as improvidently granted or, in the alternative, overruled.

2. *In Pari Materia* Does Not Apply to Laws Enacted by Two Different Governing Bodies

The State combines its response to Appellant's second and third issues into one issue because he bases both of his issues on the same incorrect premise—that the doctrine of *in pari materia* applies in this case. Musa-Valle first claims that the State failed to preserve the *in pari materia* argument; and while the State argued a different basis on direct appeal for why the two laws did not conflict, the State did argue at trial that *in pari materia* should not apply in this case. (R.R. at 7). Clearly the State argued to the trial court that the *in pari materia* doctrine did not apply and should not have been the basis for granting defendant's motion to quash. (R.R. at 14). The State did change its approach on direct appeal, which unfortunately

² Potentially there could be Double Jeopardy concerns if the State charged the defendant with both crimes based on the same facts, but that is not the case here. Appellant is only charged with one offense.

confused the issue on direct appeal, but it did not waive its argument that the *in pari materia* doctrine should not apply.

As the State argued to the trial court, the doctrine of *in pari materia* does not apply here because the two laws were promulgated by two separate and distinct governing bodies—one the Texas State Legislature and the other the City of San Antonio. This Court has found that the purpose of the *in pari materia* doctrine is to “harmonize the different provisions of the law passed by the same governmental entity: the legislature.” *State v. Vasilas*, 253 S.W.3d 268, 273 (Tex. Crim. App. 2008) (holding the doctrine of *in pari materia* does not apply when comparing the Penal Code to the Rules of Civil Procedure). On direct appeal, the State and the Fourth Court of Appeals incorrectly presumed that the doctrine of *in pari materia* could be applied to laws promulgated by two different government bodies. Therefore, this issue was not addressed directly by the Fourth Court. The State, however, did make this argument to the trial court. The Fourth Court cited to an unpublished case from the Fort Worth Court of Appeals to find that the doctrine of *in pari materia* can apply in comparing ordinances to statutes. *Musa-Valle*, 2018 Tex. App. LEXIS 5017. But this Fort Worth case does not stand for this proposition because it compared two laws enacted by the Texas State Legislature. *See Wehbe v. State*, NO. 02-07-00407-CR, 2011 Tex. App. LEXIS 3419 (Tex.

App.—Fort Worth May 5, 2011) (Te. App.—Fort Worth 2011, pet ref’d) (unpublished) (comparing a section of the Texas Occupations Code to a section of the Penal Code). In fact the Fort Worth Court stated specifically, “[t]hat the Texas statutes and Fort Worth municipal code are *in pari materia* is of no moment” and they did not address the issue. *Id.*

The doctrine of *in pari materia* is “nothing more than statutory construction” designed to give effect to laws that fulfill the legislative intent. *See Cheney v. State*, 755 S.W.2d 123, 126 (Tex. Crim. App. 1988). The rule does not apply to enactments that “were apparently not intended to be considered together.” *Id.* Comparing a city ordinance to a state law does not work to fulfill the legislative intent because there is no singular intent from one governing body. The City of San Antonio and the Texas State Legislature have two different purposes and goals in their governance; therefore, there is no way to “give effect to legislative intent,” which the only point of *in pari materia*. The preemption doctrine is the appropriate statutory construction tool to use when comparing a state law to a city ordinance to see if the two conflict, not *in pari materia*. Since *in pari materia* does not apply here, Appellant’s second and third issues should be dismissed as improvidently granted or, in the alternative, they should be overruled.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas submits that the Petition should be dismissed as improvidently granted or, in the alternative; the trial court's order quashing the State's charging information should be overruled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Lauren A. Scott, hereby certify that the total number of words in appellee's brief is approximately 2800. I also certify that a true and correct copy of the above and forgoing brief was electronically delivered to attorneys for appellant and the State Prosecuting Attorney's Office.

/s/ Lauren A. Scott

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